83-697

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,
Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAURENCE J. COHEN
TERRY R. YELLIG
1125 15th Street, N.W.
Washington, D.C. 20005

ROBERT J. CONNERTON
PHILLIS PAYNE
1899 L Street, N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether it is contrary to this Court's decisions in *Motor Vehicle Mfgrs. Assn. v. State Farm Mutual*, —— U.S. ——, 51 U.S.L.W. 4935 and *BankAmerica Corp. v. United States*, —— U.S. ——, 51 U.S.L.W 4685 for a Court of Appeals to accord extreme deference to an administrator who overturns longstanding regulations that construe quite specific statutory directives adopted contemporaneously with the enactment of the enabling statute and repeatedly reviewed and reaffirmed since and who does so without showing that the prior regulations wrongly construe the statute or have proved defective in operation?

2. Whether the regulations challenged here, whose stated justification is cost savings to Government, and which attain that objective by undermining the minimum wages of workers on federal construction projects, are contrary to the Davis-Bacon Act whose purpose is to ensure fair wages for construction workers even where paying such wages may tend to increase short term construction costs?

PARTIES TO THE PROCEEDINGS BELOW

Building and Constuction Trades Department, AFL-CIO;

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO);

Laborers' International Union of North America, AFL-CIO;

International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO;

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO;

International Union of Bricklayers and Allied Craftsmen, AFL-CIO;

United Brotherhood of Carpenters and Joiners of America, AFL-CIO;

International Brotherhood of Electrical Workers, AFL-CIO;

International Union of Elevator Constructors, AFL-CIO;

International Union of Operating Engineers, AFL-CIO;

International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO;

Tile, Marble, Terrazzo Finishers and Shopmen International Union, AFL-CIO;

International Union of Painters and Allied Trades, AFL-CIO;

Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO;

United Union of Roofers, Waterproofers and Allied Workers, AFL-CIO;

Sheet Metal Workers' International Association, AFL-CIO;

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO; and

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America;

Raymond J. Donovan,
Secretary of Labor;

Robert B. Collyer,
Deputy Secretary of Labor for Employment Standards; and
William M. Otter,
Administrator of the Wage and Hour Division,
United States Department of Labor.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Building and Construction Trades Department, AFL-CIO, *et al.*, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-titled case.

OPINIONS BELOW

The opinions of the United States District Court for the District of Columbia are reported at 543 F. Supp. 1282 and 553 F. Supp. 352 and are reproduced in the separately bound Appendix to this Petition at 49a and 68a. The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit is reported at 712 F.2d 611 and is reproduced in the Appendix at 1a.

JURISDICTION

The Court of Appeals' judgment was rendered on July 5, 1983. A Petition for Rehearing and a Petition for Rehearing *en banc* were denied by the Court of Appeals on

September 16, 1983. The Order denying the Petitions for Rehearing and for Rehearing *en banc* are reproduced at 46a and 47a. On October 4, 1983, the Court of Appeals issued an Order for stay of the issuance of the mandate until October 26, 1983 that also is reproduced at 48a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved in this case is § 1(a) of the Davis-Bacon Act, 40 U.S.C. § 276a, as amended. This provision is set forth immediately below.

STATEMENT OF THE CASE

Section 1(a) of the Davis-Bacon Act, ch. 411, § 1, 46 Stat. 1494, as amended, 40 U.S.C. § 276a, provides, in pertinent part, that:

> (a) The advertised specifications for every contract in excess of $2,000, to which the United States . . . is a party, for construction, alteration, and/or repair, . . . of public buildings or public works of the United States . . . and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed . . . .

And the Act goes on to provide that a contract based upon these specifications must contain a stipulation that the contractor shall pay wages not less than those stated in the contract specifications.

By the Act of March 23, 1941, 55 Stat. 53, and the Act of August 21, 1941, 55 Stat. 664, 40 U.S.C. § 276a-7, the foregoing requirements also apply to negotiated construction contracts of the same character. Moreover, the Davis-Bacon Act's requirements are incorporated into a number of other federal statutes covering federally financed construction. A list of these "related statutes" is contained in 29 C.F.R. § 5.1(a) (1981). *See also*, Reorganization Plan No. 14 of 1950, 15 Fed. Reg. 376 (May 24, 1950), 64 Stat. 1267, 5 U.S.C. App. 242.

The regulatory proceeding that led to the instant case began on December 28, 1979, when Secretary of Labor Ray Marshall published two related proposals in 44 Fed. Reg. 77026: the first to make certain revisions to 29 C.F.R. Part 1, *Procedures for Predetermination of Wage Rates Under the Davis-Bacon and Related Acts*; and the second to make certain revisions to 29 C.F.R. Part 5, *Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction.*[1]

As an outgrowth of those notices, "final regulations" were published in 46 Fed. Reg. 4306 and 46 Fed. Reg. 4380 (Jan. 16, 1981), with a scheduled effective date of

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[1] That rulemaking proceeding concerned not only the Davis-Bacon Act but also the Copeland Anti-Kickback Act, ch. 482, § 2, 48 Stat. 948, as amended, 40 U.S.C. § 276c, which provides:

> The Secretary of Labor shall make reasonable regulations for contractors and subcontractors engaged in the construction, prosecution, completion or repair of public buildings, public works or buildings or works financed in whole or in part by loans or grants from the United States, including a provision that each contractor and subcontractor shall furnish weekly a statement with respect to the wages paid each employee during the preceding week. Section 1001 of Title 18 shall apply to such statements.

The sole Copeland Act issue resulting from the rulemaking raised in this suit was decided in the Unions' favor both by the District Court and by the Court of Appeals and is therefore not treated at length in this petition.

February 17, 1981. However, pursuant to President Reagan's Memorandum to the Heads of All Agencies of January 29, 1981, the Secretary of Labor published a notice in 46 Fed. Reg. 11253 (Feb. 6, 1981) delaying implementation of these regulations until March 30, 1981. Then Secretary of Labor Raymond J. Donovan four times delayed the implementation of the regulations to allow reconsideration pursuant to Executive Order 12291, 46 Fed. Reg. 13193. *See*, 46 Fed. Reg. 18973 (March 27, 1981); 46 Fed. Reg. 23739 (April 28, 1981); 46 Fed. Reg. 33514 (June 30, 1981); and 46 Fed. Reg. 36140 (May 14, 1981).

On August 14, 1981, Secretary of Labor Donovan published new proposed Parts 1 and 5 in the Federal Register for comment (46 Fed. Reg. 41444 and 46 Fed. Reg. 41456), and the previously published regulations were further postponed (46 Fed. Reg. 41043). The new proposals differed substantially from both the then-current regulations and from the January 16, 1981 "final regulations" and in every instance the charge *decreased* the wage protections afforded to construction workers.

Finally, on May 28, 1982, the Secretary of Labor issued final regulations to be codified in 29 C.F.R. Parts 1 and 5 which were to become effective on July 27, 1982. This action challenging the validity of portions of these regulations (hereafter "the challenged regulations") was thereupon filed by the Building and Construction Trades Department, AFL-CIO, the AFL-CIO, fifteen national and international unions affiliated with the latter organizations and the Teamsters Union (hereafter "the Unions") against the Secretary of Labor (hereafter "the Secretary"), the Deputy Under Secretary of Labor for Employment Standards and the Administrator of the Department of Labor's Wage and Hour Division as defendants. The suit sought to overturn the portions of the challenged regulations that:

> would alter the present regulatory scheme by (1) eliminating the so-called "thirty-percent rule" by which a locally prevailing rate could be set at the rate paid to a thirty-percent plurality of local workers; (2) combining data from adjacent rural counties but excluding any nearby urban counties when wage data in a given rural county is insufficient to determine a locally prevailing wage; (3) excluding from the prevailing-wage calculation for most building projects wages paid on similar local projects that were subject to the Davis-Bacon Act; (4) expanding the permitted use of semiskilled helpers in a number of ways including permitting such a classification in areas where it is only an "identifiable" practice rather than a "prevailing" one and eliminating the requirement that helpers may do only tasks distinct from those undertaken by other classes of workers; and (5) allowing contractors to submit a weekly statement certifying compliance with Davis-Bacon wage requirements, instead of requiring the submission of the actual weekly payrolls. [Pet. App. 6a.]

The Unions promptly filed motions for a temporary restraining order, a preliminary injunction, and summary judgment and the Secretary filed a cross-motion for summary judgment.

On July 22, 1982, the District Court issued a preliminary injunction restraining the enforcement of the challenged regulations, pending final disposition of the cross motions for summary judgment. Subsequently, the District Court granted the Unions' motion for summary judgment with one exception—that court ruled that the definition of "prevailing wage" to be codified in 29 C.F.R. § 1.2(a)(1) is in accord with law. Pet. App. 68a.

On appeal the Court of Appeals affirmed the District Court on the Copeland Act "reporting" issue and on the "prevailing wage" definition issue, affirmed the District Court in part and reversed in part on the "helpers" issue

and reversed the District Court on the "Davis-Bacon projects" issue and on the "rural wage determination" issue. Pet. App. 44a. Overall, then, after the Court of Appeals' decision, three of the five challenged regulations had been upheld in full and one more upheld in substantial part.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS APPLIED THE WRONG LEGAL STANDARD IN PASSING ON THE VALIDITY OF A RADICAL CHANGE IN ADMINISTRATIVE COURSE.

The maturation of the system of federal administrative law put in place in the 1930's is bringing to the fore the question of the proper legal standard for judicial review of attempts by administrators to reverse well-settled rules. Indeed, in many areas of administrative law, the reconsideration of regulations is as common as replacing new regulatory initiatives. Such reconsiderations pose a substantial threat to the rule of law. It is the accepted postulate of our legal system that administrators are not to make law but rather to implement the law Congress has made in the enabling statute. And, all other things being equal, radical changes in longstanding regulations, particularly those issued contemporaneously with the statute's passage, and frequently reviewed and reapproved since, are particularly likely to be instances of forbidden administrative law making. Moreover, the justified suspicion that the administrator is seeking to substitute his values for the values Congress wrote into the statute is accentuated if the new regulation is not supported by a fully reasoned explanation or if the explanatory materials show that the administrator's premises are not the statute's premises. But all other things may not be equal. The enabling statute may leave large areas of discretion and contemplate a continual process of adaptation to new circumstances or a careful restudy

may persuade that the original regulation is unsound when measured against the statute or has proved defective in operation as a means of carrying out the statute. Precisely for these reasons, the process of reconsidering longstanding regulations is a particularly delicate one for the administrator and for the courts in reviewing the administrator's actions.

This case presents the important and recurring legal questions generated by such reconsiderations in a particularly clear-cut fashion. And, the approaches taken by two such able jurists as District Judge Harold Greene and Senior Circuit Judge Carl McGowan are polar opposites. Moreover, the approach of the Court of Appeals —the federal court with the heaviest administrative law docket—is contrary to the approach mandated by this Court in two decisions issued contemporaneously with the decision below. Finally, the Court of Appeals' view that the judiciary is to show extreme deference to administrators who seek to substantially alter settled rules as to what a statute means without explaining why those rules are mistaken and are not to give substantial weight to the prior administrator's understanding of the statute invites the kind of ill-considered changes that occurred here and that can only bring administrative law into disrepute.

Of equal importance, the result of the Court of Appeals' error is to undermine the protections of the Davis-Bacon Act, one of the first federal labor standards statutes in the United States Code, which has served as the model for the Walsh-Healey Act, 41 U.S.C. § 35 *et seq.* (1936) (which sets labor standards on federal supply and manufacturing contracts), for the Service Contract Act, 41 U.S.C. § 351 *et seq.* (1965) (which sets labor standards for federal service contracts), and for some forty state "little Davis-Bacon acts." Moreover, as we noted at the outset, Congress has incorporated the Davis-Bacon Act into some sixty other federal laws funding construction in almost every American community

for schools, hospitals, highways, mass transportation, libraries, water systems and housing, the most recent of which is the Federal-Aid Highway Act of 1982. This statutory complex establishes the minimum labor standards of workers employed in a substantial segment of the nation's largest industry—construction. In 1982, the total dollar volume of construction covered by the Davis-Bacon Act was approximately $30 billion. Regulatory Impact Analysis, 47 Fed. Reg. 23648-51 and 23661-64. In 1980, the Department of Labor issued 1412 wage determinations and 13,311 project determinations (*id.*), setting the labor standards for 758,000 to 1 million workers (*id.* at 23663). At stake here, therefore, is the continued vitality of a fifty year old law which affects up to a million workers annually and which is a critical component in an important segment of the economy.

Given the nature of the Court of Appeals' error and the adverse effects of that error on the proper functioning of the administrative process generally and on the proper implementation of the Davis-Bacon Act in particular, this is a classic case of a decision of a federal question in a way that is in conflict with applicable decisions of this Court that calls for the grant of a writ of certiorari.

(a) *The District Court's Approach*

The District Court, in carrying out the "judicial function" of assuring that "[a]dministrative determinations must have a basis in law and must be within the granted authority" (*Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946), proceeded from the premise that the regulations challenged here "are essentially exercises in statutory construction" of specific Congressional directives and not "exercises of broad public interest-type discretion." Pet. App. 62a. Moreover, the District Court found that in "every significant respect" the challenged regulations are inconsistent with an "[a]dministrative construction that was contemporaneous with the adoption of the Davis-Bacon Act" issued "by the administrators" who "knew best what Congress intended" and that the regulations

have "stood without substantial alteration" from 1935 to 1983. Pet. App. 61a.

Against that background, the District Court paid special attention to the present Secretary's reasons for the challenged regulations. And that court concluded both that the Secretary had failed to show that the "earlier understanding of the statute was wrong or that experience has proved it to be defective" and that the Secretary had relied on a "cost-savings" to the Government justification even though the Act is one in which "the wage floor philosophy prevailed over that which required low cost to the government as the prime consideration." Pet. App. 64a.

The District Court accorded substantial weight to contemporaneous administrative practice on the recognition that such practice is a uniquely informative guide to statutory construction. As Justice Cardozo put the point in *Norwegian Nitrogen v. United States*, 288 U.S. 294, 315 (1933):

> . . . [Administrative] practice has peculiar weight when it involves a contemporaneous construction by the men charged with the responsibility of setting [statutory] machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.

And the District Court took into account, too, that:

> [F]or forty-seven years thereafter, through the administrations of eight Presidents and fifteen Secretaries of Labor of many political and ideological persuasions, those [contemporaneous] interpretations and those regulations stood without substantive alteration. During that period none of the administrators effected the kinds of fundamental changes that are brought about by the regulations adopted two months ago; instead, the various Secretaries of Labor continued to interpret and enforce the laws precisely in accordance with the original understanding. Nor can this stability and consistency in construction by those charged with the laws' enforcement be attributed to inattention, oversight, or neglect (as is some-

> times true when relatively obscure laws or regulations are involved). The Davis-Bacon Act is and always has been a well-known law, affecting millions of employers and wage-earners throughout the United States, and it has frequently been the subject of political and other controversy. [Pet. App. 61a.]

In sum, in the District Court's view, the rule of judicial deference to contemporaneous regulations adopted by the executive officers who are involved in the legislative process rests on a sound appreciation of those officers' unique opportunity to understand every nuance of the enabling legislation and of the legislative intent embodied in the statute's literal language. The rule of deference to long-standing administrative interpretations also rests on the unassailable logic that a regulation that is accepted by executive officers of different viewpoints and different parties and is left unchanged by a sucession of Congresses is likely to be in accordance with the enabling statute. Justice Cardozo captured the essence of this logic some years prior to his *Norwegian Nitrogen* opinion when he stated, "Not lightly vacated is the verdict of quiescent years." *Coler v. Corn Exchange Bank*, 250 N.Y. 136, 141, 164 N.E. 882, 884 (1928), *aff'd*, 280 U.S. 218 (1930).

(b) *The Court of Appeals' Approach*

The Court of Appeals' view of an administrator's responsibility in making a change of the kind at issue here and the judicial role in reviewing such a change could not have been more different. That approach is stated at the outset in the section upholding the Secretary's "prevailing wage" definition: ". . . [O]ur task is limited to ensuring that the new definition is not one 'that bears no relationship to any recognized concept of [the statutory term] or that would defeat the purpose of the [statutory] program.'" Pet. App. 10a quoting *Batterton v. Francis*, 432 U.S. 416, 428 (1977).[2] That standard of ex-

[2] *Batterton*, we note, is not in point even if it is assumed that for the purpose of judicial review, a change in a long-standing rule is

treme deference was followed throughout. Of equal importance, at no point did the Court of Appeals accord any dispositive weight to the prior regulatory record. Indeed, that court expressly "disagree[d] with the District Court's heavy reliance on [prior contrary long-standing] administrative practice . . . ." Pet. App. 15a.

(c) *This Court's Precedents*

Two decisions by this Court last Term demonstrate that the Court of Appeals' approach in this case is wrong. In *Motor Vehicle Mfgrs. Assn. v. State Farm Mutual*, —— U.S. ——, 51 U.S.L.W. 4935, 4956 (June 24, 1983), the Court stated:

> [T]he revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to

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no different than the initial promulgation of a rule. For, the delegation to the Secretary of Labor in the Davis-Bacon Act bears no relation to the all but unlimited authority of the HEW Secretary under § 407(a) of the Social Security Act, 42 U.S.C. § 607(a), as construed in *Batterton*, 432 U.S. at 417-418, 424-426. The language of 42 U.S.C. § 607(a) provides:

> (a) the term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a)(2) of this title who has been deprived of paternal support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a)(1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

The critical language is that in the parenthesis: "as determined in accordance with standards prescribed by the Secretary." Congress thereby expressly authorized the HEW Secretary to establish *standards* according to which the states were to determine claimants' "unemployment" status in particular cases. No such authority to prescribe standards is contained in the provisions of the Davis-Bacon Act. Rather, Congress set the standards in the statute itself and the Secretary of Labor in determining prevailing wages must proceed in accordance with those standards just as the states must proceed in accordance with the HEW Secretary's standards in determining who is an "unemployed father."

> the proper course. A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973).

Even where the only statutory limitation on the administrator is the arbitrary and capricious standard of judicial review stated in the Administrative Procedure Act, to overcome that presumption:

> [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).... Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise. [51 U.S.L.W. at 4956.]

Moreover, just two weeks earlier in *BankAmerica Corp. v. United States*, —— U.S. ——, 51 U.S.L.W. 4685 (June 9, 1983), the Court had emphasized that the presumption later reaffirmed in *Motor Vehicle Mfgrs.* is far more binding when the administrative practice goes to the correct interpretation of the enabling statute and does not merely canalize administrative discretion. Because of its importance we set out the relevant portion of that opinion at some length:

> [T]he Government does not come to this case with a consistent history of enforcing or attempting to enforce Section 8 in accord with what it urges now. On the contrary, for over 60 years, the Government

made no attempt, either by filing suit or by seeking voluntary resignations, to apply Section 8 to interlocks between banks and nonbanking corporations, even though interlocking directorates between banks and insurance companies were widespread and a matter of public record throughout the period. . . . "[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *FTC v. Bunte Brothers, Inc., supra,* [312 U.S. 349, 353].

* * * *

When a court reaches the same reading of the statute as the practical construction given it by the enforcing agencies over a 60 year span, that is a powerful weight supporting such reading. Here, moreover, the business community directly affected and the enforcing agencies and the Congress have read this statute the same way for 60 years. . . . While these views are not binding on this Court, the weight of informed opinion over the years strongly supports the District Court holding that Congress intended the statute to be interpreted according to its plain meaning. [51 U.S.L.W. at 4687-4688 (emphasis added)].

(d) *The Consequences of the Court of Appeals' Error*

The Court of Appeals' deferential approach which accords no dispositive weight to the prior contrary longstanding reading of the statute and requires nothing in the way of reasoned explanation of the need for a change cannot be squared with the presumption described in *Motor Vehicle Mfgrs.* and in *BankAmerica.* And that erroneous approach was decisive below since the Secretary's explanation of the challenged regulations is plainly insufficient to overcome that presumption and, in fact, by its lack of fidelity to the Davis-Bacon Act's purpose shows that the challenged regulations are not an attempt

to carry out the statutory mandate but rather an attempt to change that mandate to fit the Secretary's own view of what the statutory purpose should be.

The Secretary explained those regulations in the preamble thereto, 47 Fed. Reg. 23644-23651 and 47 Fed. Reg. 23658-23664, and in the Regulatory Impact Analysis (RIA) which was summarized in the preamble. Both focus on the *cost* aspects of the new regulations and the extent to which regulatory changes will succeed in *lowering* wage rates paid on public construction and in that fashion save money for the Federal Government. But, the basic purpose of the Davis-Bacon Act and its related statutes is to ensure fair wages and working conditions for laborers and mechanics employed on federally-funded construction, and not to save money for the Government. *United States v. Binghampton Construction Co.*, 347 U.S. 171 (1954). As the District Court recognized:

> The basic purpose of the Davis-Bacon Act is to protect the wages of construction workers even if the effect is to increase the costs of construction to the federal government. In 1931 and 1935—notwithstanding such opposition as that of President Hoover who cited a "great increase in expense to the taxpayer" as one of his principal grounds—the wage-floor philosophy prevailed over that which regarded low cost to the government as the prime consideration . . . . Under our constitutional system, policy decisions are not made by government administrators; they are made by the Congress. In this instance Congress made its decision, first in 1935 by the enactment of the Davis-Bacon Act, and then again in the forty-seven years since that time by the failure and refusal of succeeding Congresses either to change the law or to suggest that in all these years it had been improperly interpreted and applied. [543 F. Supp. at 1290-91] (footnote omitted).

Thus, the Secretary's explanation fails to provide a rationale consistent with the Act for any of the administrative changes incorporated in the challenged regulations.

In sum, the Court of Appeals, by its failure to follow this Court's directions in *Motor Vehicle Mfgrs.* and in *BankAmerica*, allowed "[t]he deference owed to an expert tribunal . . . to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress" (*American Ship Bldg. v. NLRB*, 380 U.S. 300, 318 (1965)).[3]

II. THE COURT OF APPEALS' DECISION WILL ELIMINATE THE CENTRAL WORKER PROTECTION PROVIDED BY THE DAVIS-BACON ACT—THAT WAGE DETERMINATIONS BE BASED UPON WAGES PREVAILING FOR DISCRETE CORRESPONDING "CLASSES OF LABORERS AND MECHANICS."

The most critical adverse consequence of the Court of Appeals' decision is to undermine a central component of the protections for construction workers Congress wrote into law in 1935. In that year, after extensive hearings, Congress determined that the 1931 Davis-Bacon Act was insufficient to protect those workers and, therefore, instructed the Secretary to base his wage determinations on those prevailing for "*classes of laborers and mechanics.*" That critical statutory term was understood by the 1935 Congress and has been uniformly understood by the Secretary from 1935 to 1982 to require that each such class be discrete and distinguishable. Throughout that period, it has been understood as well that a blurring of the line between "classes of laborers and mechanics" would destroy the integrity of the statutory scheme and, indeed, in practical terms would read this critical protective requirement out of the Act. The Secretary's new interpretation of "classes of laborers and mechanics"

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[3] While, as we have stressed, the District Court did follow the correct standard of judicial review, that court, we believe, misapplied that standard in upholding the challenged regulation defining the critical statutory term "prevailing wage". Thus, if the writ is granted we will seek the invalidation of all of the challenged Davis-Bacon regulations.

will, in effect, revive the very abuses of overlapping classifications which destroyed the 1931 Act as a practical protection for construction workers and which Congress intervened to correct in passing the 1935 Act.

Congress recognized in writing the Davis-Bacon Act that the construction industry work force is made up of groups of workers—denominated in the statute as "classes of laborers and mechanics"—and that wages are set separately for each separate class; and Congress' purpose in that Act was to maintain the minimum wage for *each such class*. It is inherent in the nature of things that such a statutory minimum wage scheme cannot achieve its intended purpose if employers are free to assign duties to a lower paid class that overlaps with higher paid classes. The District Court was entirely correct in holding:

> [T]he integrity of the statutory scheme requires that each 'class of laborers and mechanics' be comprised of 'members' who perform 'well-defined tasks' and do not perform traditional craft work of another, higher paid class . . . [I]n practice that distinction can be maintained only if the tasks of the helper class are defined as discrete and distinguishable from those of mechanics and laborers. . . . (Pet. App. 72a).
>
> * * * *
>
> [I]f contractors could thus assign a helper to perform the tasks of any and all classes of laborers and mechanics and they could do so at lesser pay, they would do just that, and the requirement that wages be based on "corresponding classes" will be effectively read out of the law. (Pet. App. 52a).

Nevertheless, the Court of Appeals approved the Secretary's new interpretation of "classes of laborers and mechanics" which embraces a helper who "undertakes tasks that overlap with those of higher paid journeymen and laborers" (Pet. App. 22a) and whose "essential functional distinction would not be the nature of the task

done but rather the subordinate position of the helper *vis-a-vis* a journeyman." (Pet. App. 23a).[4]

For the first time, the Secretary of Labor will be permitted to base wage determinations on duplicitous and overlapping "classes of laborers and mechanics" so that the helper "may perform any task throughout the entire construction field. . . ." Pet. App. 52a. Thus, under the new interpretation of "classes of laborers and mechanics," a helper paid at a lower rate will be allowed to perform the duties of the various classes of higher paid journeymen so long as the helper does so under the supervision of a journeyman.

We submit that the Secretary's new definition of "classes of laborers and mechanics" is: (a) plainly contrary to the statute and, indeed, revives the very classification abuses that arose under the 1931 statutory scheme and that the 1935 Congress expressly intended to eliminate; and (b) inconsistent with the Secretary's recognition from 1935 to 1982 that "classes of laborers and mechanics" must be distinct from one another and that tasks assigned to each class may carry with them but *one* wage rate.

The Secretary's decision to now abandon this long-standing interpretation of "classes of laborers and mechanics" is incorrectly characterized by the Court of Appeals as an enforcement decision as to which "our deference to his choice is properly near its greatest." Pet. App. 37a. We respectfully disagree. The issue is one of statutory interpretation. The central enforcement questions were answered by Congress in 1935 when the legislature amended the Davis-Bacon Act to put "teeth" into the prevailing wage principle.

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[4] The Court of Appeals did invalidate the Secretary of Labor's new regulation insofar as the regulation would permit the recognition of helpers where only "identifiable" in the area, rather than "prevailing," as has previously always been required. Pet. App. 26a.

The original 1931 Act simply provided that "the rate of wage for all laborers and mechanics employed by the contractor or any subcontractor . . . shall be not less than the prevailing rate of wages for *work of a similar nature* . . . ." While there was no quarrel with the prevailing wage principle in theory, its unenforceability in practice gave rise to immediate Congressional hearings. Those hearings showed that these enforcement problems existed, in part, because the 1931 Act did not include a concept of "classes of workers." Thus, in 1932, Secretary of Labor William Doaks described the types of disputes arising under the 1931 Act, emphasizing those arising:

> as to the classification of work—that is using men of a lesser classification frequently to do the work of journeymen while receiving pay as helpers or skilled laborers. [Hearings on H.R. 12 Before the House Committee on Labor, 72nd Cong., 1st Sess. at 163 (1932).]

There were additional hearings in 1932 that led to the enactment of amendments which President Hoover vetoed. Hearings on S. 3847 and H.R. 11865 Before the House Committee on Labor, 72nd Cong., 1st Sess. (1932). Then further extensive congressional hearings spurred by the same enforcement concerns followed in 1934. These too are replete with examples of the problem of improper classification under the original Act. Hearings on S. Res. 228 Before the Senate Subcommittee on Education and Labor, 73rd Cong., 2nd Sess. (1934). Following these hearings, the Senate Committee on Education and Labor issued its extensive Senate Report 332. S. Rep. 332, 74th Cong., 1st Sess. (1935). The Report described in vivid detail the "variety of matters [which] came to the attention of the Committee at the open hearings, embracing all known methods used or devices contrived to underpay labor . . . ." The Committee found that these "devices," including those of misclassification, flourished because of "defects . . . in substantive portions of the statutes." *Id.* at 5. The statutory "defects" leading to

the problem of misclassification were described clearly by the Committee:

> . . . *The act also fails to be explicit on the matter of classification, with the result that many contractors were able to circumvent the law by hiring mechanics as common laborers, and then assigning them to tasks which fell within the purview of one of the skilled crafts.* Both these points should be clarified by new legislation [(emphasis added) *Id.* at 5.]

The Report described by way of examples and by way of criticizing the classification practices under other public works statutes the nature of the evil it had found:

> . . . The revised Public Works Administration zone rates in favor of which much can be said, since they seek to take into account conditions in living and wage standards in various parts of the country, have been largely broken down by intermediate classifications of labor and *failure to retain the strict lines of demarcation intended to be drawn and maintained between skilled and unskilled labor. The whole tendency has been for wages of the skilled group to descend toward the level of the unskilled group, this by reason of intermediate classification devices.* [(emphasis added) *Id.* at 13, 16-17.]

It is clear that the Committee was expressing its understanding that when the lines between classes of workers were allowed to blur, *viz.*, if there was a failure to retain "strict lines of demarcation", then enforcement of the prevailing wage principle becomes impossible because work assignments inevitably flow down to the lower wage classification. It is in this context that the 1935 amendments added the requirement that the prevailing wage be based upon the wages paid "corresponding classes of laborers and mechanics." The Congress had found a "substantive defect in the statute" and acted to correct that defect.

The Court of Appeals refers to the addition of this language as an "unexplained change." Pet. App. 33a.

In so doing, that court disregarded the 1935 legislative materials that explain that change with great lucidity. Congress recognized and was clearly seeking a remedy for the "tendency . . . of wages of the skilled group to descend toward the level of the unskilled group and this by reason of the failure to retain the strict lines of demarcation intended to be drawn and maintained between skilled and unskilled labor." S. Rep. 332 at 13, 16-17.

And the Court of Appeals compounded its error by reaching back to a few lines of colloquy during the 1932 debates having nothing to do with the intended meaning of "classes of mechanics and laborers" and granting that colloquy controlling significance. Pet. App. 34a.[5]

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[5] The Court of Appeals relied upon a colloquy between Rep. Connery and Rep. Johnson to establish that Congress did not intend to implement a "union" classification scheme. An examination of the 22 lines of colloquy in the context of 27 pages of House debate shows it was wholly unrelated to what classification practices the Congress intended to adopt or not adopt. Rather, the colloquy was part of a description of the procedures utilized by the Secretary of Labor beginning in 1931 to ascertain the prevailing rate. An examination of the full debate shows that Rep. Connery frequently stated his familiarity with the procedures being utilized by the Secretary of Labor and explicated those procedures to his colleagues. 75 Cong. Rec. 12363-90. Thus, because there was no concept of classes of workers in the 1931 Act, any discussion between members of the 1932 Congress concerning the manner in which the Secretary of Labor was ascertaining the prevailing rate at that time can shed no light on the intended meaning of the phrase "classes of laborers and mechanics" which was not added to the Act until 1935.

Moreover, the Court of Appeals' concern with whether Congress mandated a "union classification" system does not address the pertinent issue. Rather, the question is whether Congress contemplated a statutory scheme which permits overlapping classes of workers doing the same work and receiving different wage rates or whether Congress mandated a prevailing wage system based on "strict lines of demarcation" between classes. We submit that the Congress was not concerned with whether it was sanctioning a union or non-union classification system in 1935, but did intend to establish a classification system based upon distinct and discrete classes of construction workers.

The clear message of the 1935 Act and its background—that the phrase "classes of laborers and mechanics" reflected the Congressional intention to "retain the strict lines of demarcation" between crafts—was uniformly recognized from 1935 to 1982. Charles Donahue, Solicitor of Labor from 1961 to 1965, provided a description of the origins of the principle of distinct and exclusive classes in the 1935 Act:

> The term [classes and corresponding classes of laborers and mechanics] . . . [was] not included in the original Davis-Bacon Act of March 3, 1931, which simply provided that "the rate of wage for all laborers and mechanics employed by the contractor or any subcontractor . . . shall be not less than the prevailing rate of wages for work of a similar nature . . . ." The investigation of the Walsh Committee, which contributed to the enactment of the act in its present form, disclosed that under the original act, there had been a failure to retain strict lines of demarcation between skilled and unskilled labor. As a consequence, the tendency had been for wages of the skilled group to descend toward the level of the unskilled group. As a result, the "work of a similar nature" standard was deleted, and in lieu thereof provision was made for wage determinations for "classes" of laborers and mechanics from the locally prevailing wages paid "corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work. Donahue, *The Davis-Bacon Act and the Walsh-Healey Public Contracts Act: A Comparison of Coverage and Minimum Wage Provisions*, 29 Law and Contemporary Problems 488, 508 (1964), cited at Pet. App. 35a.

Successive Department of Labor administrators and the Comptroller General have repeatedly reaffirmed that even where prevailing in the area, a helper may not be recognized unless "exclusive" work differences exist between helpers and other classes:

> We do not think, however, that the Davis-Bacon Act authorizes the imposition of work classifications on the sole basis that a local practice does exist. Unless local practices clearly establish actual differences in work classifications, or *unless they are exclusive*, it seems clear that this adoption in the designation of classifications is neither required nor permitted by the terms of the Davis-Bacon Act. (emphasis added) Comptroller General Opinion No. B-147847 (December 17, 1964).

The principle that the same work does not belong in two wage rate classifications has not been confined to helpers alone. The Department of Labor also examines classes of skilled workers to determine that their tasks are not overlapping. *In re Brezina Construction Company*, WAB No. 68-10 (1969).

In sum, because the proper interpretation of the term "classes of laborers and mechanics" is so central to the statutory scheme; because as shown above the Secretary's new reading of that term is contrary to the Act's purpose of protecting construction workers; because the Court of Appeals' opinion rests on the unduly restrictive standard of review and a failure to accord proper weight to the 1935 legislative history and the uniform practice from 1935 to 1982; and because these errors all but remove a limitation on the Secretary the 1935 Congress deemed critical to provide, we submit that the decision of the Court of Appeals should not be permitted to stand.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LAURENCE J. COHEN
TERRY R. YELLIG
1125 15th Street, N.W.
Washington, D.C. 20005

ROBERT J. CONNERTON
PHILLIS PAYNE
1899 L Street, N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)